

**ARKANSAS COURT OF APPEALS**DIVISION III  
No. CACR 07-1240

DELROY FOSTER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** SEPTEMBER 3, 2008APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT,  
[NO. CR-2005-502-A]HONORABLE GARY RAY  
COTTRELL, JUDGE

AFFIRMED

**JOHN B. ROBBINS, Judge**

Appellant Delroy George Foster was convicted of possession of marijuana with intent to deliver and possession of drug paraphernalia by a jury in Crawford County Circuit Court. Approximately 200 pounds of bundled marijuana and other paraphernalia were located inside the open cargo space of a Chevrolet Trailblazer stopped by a State Police officer along Interstate 40. Katherine Burgos was driving, and appellant, who had rented the vehicle, was the front seat passenger. Each denied knowledge of the drugs and paraphernalia being in the vehicle. Each defendant's case was tried separately. Appellant's trial was conducted first. The prosecutor affirmatively stated that no promises or deals had been made to Burgos for her testimony, other than that her truthfulness on the stand would be taken into consideration. Burgos's defense attorney agreed with the prosecutor's statement. Appellant was convicted by the jury, and he received a thirty-five-year prison sentence.

On appeal, appellant argues that the trial court abused its discretion (1) in limiting defense counsel's cross-examination of Burgos regarding her motive to testify against him and in favor of the State; and (2) in denying his motion for new trial, where appellant showed that Burgos pleaded guilty the day after his trial and received an effective ten-year sentence, which was more favorable than the first plea offer prior to appellant's trial. We affirm.

Appellant's first point on appeal concerns the limitation of his attorney's cross-examination of Burgos. Burgos testified that appellant had arranged a drug run from Arizona to New York, in which she agreed to participate because she needed the \$5000 she was supposed to be paid. Burgos testified that she had never done anything like this before but that appellant had. She said she came forward to the prosecutor approximately a year after they had been arrested.

Defense counsel cross-examined Burgos, during which she admitted that there had been a plea deal offered to her prior to this trial, although she did not expect to garner a better deal for having testified against appellant. Upon objection from the prosecutor, however, the trial court did not allow defense counsel to ask exactly what the terms of that offer were, specifically telling defense counsel not to discuss "numbers." Defense counsel asserted to the trial court that he knew Burgos had been offered a fifteen-year sentence and that it was unbelievable that she did not expect to be given a lesser sentence for having testified against appellant. The judge held to his ruling, limiting the cross-examination by excluding any discussion of actual years contemplated in the plea offer.

Upon further examination by defense counsel, Burgos stated that she did not expect to receive a better deal than she had been originally offered, and that she had no idea if she would plead to the same thing. The prosecutor elicited these final comments from Burgos, “I don’t think I’m going to walk free. I think I’m going to prison.” Thereupon, her testimony was concluded.

Appellant testified in his own defense, stating that he had a sexual relationship with Burgos, that they were traveling together in the vehicle he rented, but that he had no idea she put drugs in the vehicle. Appellant admitted that he purchased the Febreze-brand air freshener, which was found in the floorboard near his feet in the vehicle, but not to mask the smell of marijuana. Appellant testified to his belief that Burgos was fabricating this story against him to help herself acquire a lesser sentence. On this and other proof presented by the State through police officers and State Crime Laboratory personnel, the jury found appellant guilty as charged.

We review matters concerning the scope of cross-examination under an abuse-of-discretion standard. *Rodgers v. State*, 360 Ark. 24, 199 S.W.3d 625 (2004). The use of cross-examination is an important tool in bringing the facts before the jury, and wide latitude should be afforded by the trial court. *Id.* However, a circuit court must determine when the matter has been sufficiently developed and when the outer limits of cross-examination have been reached; unless the trial court's discretion has been abused, we will not reverse. *Id.* Stated another way, the trial court has considerable discretion in determining the scope of cross-examination. *See Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

Full cross-examination should be allowed in order to show bias, and this is especially true in the case of an accomplice since her testimony is the direct evidentiary link between the defendant and the crime. *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983). This rule applies to testimony given under expectation or hope of immunity or leniency. *Id.* The test is the expectation of the witness and not the actuality of a promise. *Id.* Denial of cross-examination to show the possible bias or prejudice of a witness may constitute constitutional error of the first magnitude as violating the Sixth Amendment right of confrontation. *Id.*

However, once the main circumstances showing bias have been admitted, the trial judge does have the discretion to determine how far the examiner may delve into the details. *See Smith v. State*, 291 Ark. 163, 722 S.W.2d 853 (1987). When the evidence reaches this posture, the trial court may impose reasonable limits on cross-examination based upon concerns about harassment, prejudice, waste of time, unnecessary duplication of testimony, confusion of issues, or interrogation that is repetitive or only marginally relevant. *See Bowden v. State*, 301 Ark. 303, 783 S.W.2d 842 (1990). The trial court's discretion to limit these details will not be reversed absent a showing of abuse. *Smith*, 291 Ark. at 171, 722 S.W.2d at 858.

We hold that this case reached the posture that appellant showed, without any real question, that Burgos had reason to be biased or had a motive to give false testimony against him and had in fact been offered a plea agreement prior to trial. It was not an abuse of discretion to prevent discussion of the exact number of years offered, especially where Burgos

did not believe she was going to receive a more favorable plea deal after her testimony at trial. We hold that no abuse of discretion has been demonstrated on this point.

Next, appellant contends that the day after appellant's trial, Burgos took an effective ten-year sentence, in exchange for a guilty plea. The motion noted that both appellant and Burgos had been offered effective fifteen-year deals prior to trial. This, appellant argued, showed new evidence that supported his motion for a new trial that did not exist at the time of trial. The judge did not act on this motion, thus it was deemed denied thirty days after it was filed.

The decision on whether to grant or deny a motion for new trial lies within the sound discretion of the circuit court. *Henderson v. State*, 349 Ark. 701, 80 S.W.3d 374 (2002). We will reverse a circuit court's order granting or denying a motion for new trial only if there is a manifest abuse of discretion. *Id.* A circuit court's factual determination on a motion for new trial will not be reversed unless clearly erroneous. *Id.*

As we understand appellant's argument, he contends that there might not have been an overt extension of a more favorable plea agreement at the time of trial but that there was an unspoken agreement to negotiate further based upon her performance at appellant's trial. This, he argues, is new evidence that the jury should have heard. We disagree.

As discussed, the jury was well aware that Burgos was facing imprisonment and that she had been offered a deal with the State prior to trial. Indeed, the prosecutor and defense counsel had expressed that there was no understanding going forward other than that her truthfulness at this trial would be considered. The bias appellant desired to establish was

accomplished. Burgos, at the time of trial, did not believe she would receive any more leniency after this trial. Whether the jury believed her was up to it to decide. In order to reverse the denial of a new trial, appellant would have to demonstrate a reasonable probability that had the alleged better deal (if it existed at the time of trial) been revealed to the jury, then the result of the trial would have been different. *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990). The general rule is that evidence that only attacks the credibility of other testimony is not grounds for new trial. *See, e.g., Taylor v. State*, 299 Ark. 123, 771 S.W.2d 742 (1989); *Orsini v. State*, 281 Ark. 348, 655 S.W.2d 245 (1984). Thus, we conclude that the trial court did not abuse its discretion in denying the motion for new trial.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.